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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WALLACE L. JOYCE,
PETITIONER

V.

STATE OF CONNECTICUT,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1.) Personal property of the Petitioner including his clothing and a wristwatch was taken from the fire scene on January 29, 1990 for custodial caretaking. The next day, the property was transferred to the State Forensic Laboratory for chemical analysis without a warrant. Did the transfer of property for investigatory purposes without the Petitioner's consent and without a warrant constitute an illegal seizure under the Fourth Amendment to the United States Constitution?

2.) Does the State's perpetual possession of Petitioner's property from the date the property was transferred to the State Forensic Laboratory on January 30, 1990 to the present day constitute a continuous unlawful trespass against personalty that was not remedied by the State's execution of a warrant at the Office of the Clerk of the Superior Court on January 11, 1995?

3.) Did the United States Supreme Court envision the expansion of the independent source doctrine to include cases where personal property is held by the State for nearly five years without a warrant and where the earlier inadmissible test results are incorporated into the warrant application?

LIST OF PARTIES

All parties to the proceeding appear in the caption of the case on the cover page. This case does not involve any corporation and, hence, the mandate of Rule 29.6 is inapplicable.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court to review the merits appears at Appendix A to this petition and is cited at 243 Conn. 282.

The subsequent order respecting the Motion For Reargument and For En Banc Reargument is reproduced at Appendix B according to the requirements of Rule 33.1(c) and the Court's Memorandum respecting reproduction of documents in the Appendix. The order respecting the pro se Motion For Leave to Amend Defendant-Appellant's Motion For Reargument and For En Banc Reargument is reproduced according to the requirements of Rule 33.1(c) and the aforementioned Memorandum and appears at Appendix C. As of the date this writ was prepared by the Petitioner, neither order was published in the most current volume of the Connecticut Reports, namely, Volume 243.

JURISDICTION

The Connecticut Supreme Court rendered its panel decision in State v. Joyce on November 25, 1997. A copy of that decision appears at Appendix A.

Thereafter, a Motion For Reargument and For En Banc Reargument was timely filed in accordance with Connecticut's Joint Rules of Appellate Procedure on December 2, 1997. A Motion, filed pro se, For Leave to Amend Defendant-Appellant's Motion For Reargument and For En Banc Reargument was filed three days subsequent.

The Motion For Reargument and For En Banc Reargument was denied on December 10, 1997 and appears at Appendix B. The pro se Motion For Leave to Amend Defendant-Appellant's Motion For Reargument and For En Banc Reargument was dismissed on December 10, 1997 and appears at Appendix C.

The writ of certiorari is filed within ninety days after the order denying the Motion For Reargument and For En Banc Reargument as permitted by Section 3 of Rule 13 of the Rules of the Supreme Court of the United States. The statutory jurisdiction of this Court arises from its discretionary review power cited at 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On January 29, 1990, Petitioner Wallace Joyce entered the home of his deceased father, hit the entranceway light switch just inside the door jam and was hit from the left side just seconds later with what Petitioner termed a "bolt" or "ball of fire." (Tr. transcript, pp. 1065, 1070). East Haven police, fire and medical personnel were dispatched to the scene where the sixty-one year old Petitioner was treated for extensive burns covering over 42% of his body most of which were justified to his left side. (Tr. transcript, pp, 179, 222, 1084).

In order to administer treatment, the clothing was cut from Petitioner's body and was left lying in the road.[1] (Tr. transcript, pp. 586, 1308). Detective Bruce Scobie removed the property of the Petitioner from the road and placed the personalty of the Petitioner in the trunk of the police cruiser so it "wouldn't be thrown out or lost." (Tr. transcript, pp. 586, 1308).

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[1]Forensic expert Michael K. Higgins of K-Chem Laboratories in Boston testified that any chemical testing of the clothes was necessarily contaminated by the way in which the clothing was handled at the scene. Indeed, Higgins testified that gas chromatography is such a sensitive test that mere odors in the trunk of the police cruiser could infuse into the clothing and be detected. Higgins testified that there were multiple points of cross-contamination in this case so that "if something was found on the clothing," it was not possible to determine "what the source of that petroleum product was." (Tr. transcript, pp. 1310-1311)

However, the next day it was determined by investigators that the property would not be returned to the Petitioner. Instead, Detective Scobie gave the Petitioner's property to the former Fire Marshal Frederick Brow who transported the clothing, without a warrant, to the State Forensic Laboratory for chemical testing. The testing revealed traces of a petroleum distillate "similar to" gasoline on some items of clothing. In an April 16, 1990 Motion to Suppress, Petitioner moved not only to suppress the results of these chemical tests in his first trial but moved for the return of his personalty transported to the State Forensic Laboratory and subjected to chemical analysis without a warrant. (See generally, 229 Conn. 10).

Among other issues, the Petitioner appealed to the intermediate appellate court on the basis of this Motion to Suppress asking for the immediate return of his property. The dissenting opinion of Justice Heiman noted that "the transportation of the clothing to the State Forensic Laboratory constituted an unlawful seizure." 30 Conn. App. 164 at 184.

Thereafter, Petitioner appealed to the Connecticut Supreme Court which agreed to hear the case sitting en banc. The Connecticut Supreme Court determined that the chemical testing of the clothing constituted an illegal search and suppressed the results of those tests under Article First, §7 of the Connecticut Constitution. 229 Conn. 10 at 27. The Court further found that it was not necessary to reach the issue of whether the transmittal of the clothing constituted an illegal seizure since

the chemical analysis constituted an illegal search. 229 Conn. 10 at 18. The Court did take judicial notice that Petitioner's wristwatch was among the property taken by investigators that remained wholly unaccounted for by the State. 229 Conn. 10 at 23, Footnote 15. The judgment of the trial court was reversed and the case was remanded. 229 Conn, 10 at 28.

In lieu of returning the personalty to the Petitioner or awaiting further proceedings by the trial court respecting the return of this property, investigators executed a search warrant, containing the results of the first illegal search, at the Clerk's Office of the Superior Court at 121 Elm Street, New Haven, Connecticut where the property was detained as exhibits of the first trial. The results of the second gas chromatograph tests were admitted in the second trial over Petitioner's October 16, 1995 Motion to Suppress.[2]

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[2] The results of the chemical analysis of Petitioner's clothing was referred to by the Connecticut Supreme Court as conclusive of gasoline. 243 Conn. 282 at 287. However, expert testimony proved that it is forensically impossible to make such a conclusive determination. (Tr. transcript, p. 1331).

Despite the inclusion of the first illegal test results in the warrant, a panel decision of the Connecticut Supreme Court held that investigators had probable cause[3] prior to the illegal intrusion constituting an independent source for the admission of the second test results. 243 Conn. 282 at 296. Although the Fourth Amendment was properly raised in this second and direct appeal to the Connecticut Supreme Court, the Court again declined to address whether an illegal seizure occurred under the Fourth Amendment of the United States. 243 Conn. 282 at 294. It is from this holding that the Petitioner respectfully asks the Highest Court that a writ of certiorari issue.

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[3]Although the United States Supreme Court does not review the factual findings of the lower courts, I wish only to apprize this Court that immediately after my incarceration, the certified police file was obtained and reveals in black and white terms that prosecution witnesses lied under oath to obtain my conviction. I understand that this matter has been referred to Governor John Rowland and to the Connecticut Supreme Court by the Ad Hoc Committee to Vindicate Wallace Joyce. I understand further that this matter has been referred by the Office of Governor John Rowland to New Haven State's Attorney Michael Dearington for his review.

REASONS FOR GRANTING THE WRIT

Petitioner asks that the United States Supreme Court exercise its discretionary jurisdiction in this case because the Connecticut Supreme Court has rendered a decision on the Fourth Amendment "that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court" as per Section (c) of Rule 10 of the Rules of the Supreme Court of the United States.

Simply stated, the ruling of the Connecticut Supreme Court in State v. Joyce, 243 Conn. 282 offends the logic and reasoning of the Court in Murray v. United States, 487 U.S. 533. In Murray, this Court said that there must be a genuinely independent source for the admission of evidence once an illegal intrusion occurs and that a genuinely independent source "may well be difficult to establish where seized goods are kept in the police's possession." 487 U.S. 533 at 542, See also, McGarry's Inc. v. Rose, 344 F.2d 416 and United States v. Silvestri, 787 F.2d 739.

The decision is Joyce renders the Court's aforesaid parenthetical meaningless. In Joyce, property was kept in an evidence locker without a warrant for nearly five years before a warrant was executed at the Clerk's Office of the Superior Court. The State never relinquished its control over the property despite Petitioner's April 16, 1990 Motion to Suppress requesting immediate return of this property. The dissent in Segura v. United States found 18 hour access to property without a warrant disturbing. In Joyce, Connecticut has determined that a five year detention of personalty without a warrant is acceptable.

Most importantly, the Joyce ruling overwrites the parameters of the independent source doctrine as set by this Court. The cases involving the independent source doctrine have been employed primarily where there is "administrative delays" or other minor faults on the part of law enforcement to timely execute a warrant but does not speak to bad faith on the part of the police. Indeed, there is a contemporaneity between the illegal intrusion and the eventual issuance of the warrant and a clearly independent source for its admissibility. Because of the strong public policy reasons behind ceasing the trafficking of contraband, Petitioner notes that the independent source doctrine nas been applied primarily in the seizure of drugs and related drug paraphenalia.

Likewise, the independent source doctrine has been applied principally to cases of illegal entry. Even if the independent source doctrine is applied to personal property such as clothing, one point is clear in the Murray decision. Whereas police should not be placed in a worse position because of the initial illegal intrusion, they must not be placed in a superior position. The holding in United States v. Ceccolini, 435 U.S. 268 (1978) makes clear that the more flagrant the initial illegality is, the more reason there is to suppress any and all evidence that can be perceived as deriving from the initial illegality.

In Joyce, the actions of investigators were bold and flagrant. They perceived no need on their part to secure a warrant before transporting Petitioner's property to the State Forensic Laboratory for testing despite state appellate decisions throughout the country recognizing that property of a medical emergency victim must be taken pursuant to a warrant when the purpose is investigatory, People v. Wright, 804 F.2d

866 (Colo. 1991), State of Maine v. Richards, 296 A.2d 129 (Me. 1972) and the mandate set down in Cady v. Dombrowski, that the community caretaking function cannot be used as a ruse but must be "totally divorced from the detection, investigation and acquisition of evidence relating to criminal activity." 413 U.S. 443 at 441.

As investigators initial actions were in flagrant violation of the Fourth Amendment in Joyce , investigators further employed the test results of their initial illegal intrusion as the foundation of the warrant application. As it is nearly impossible to see how investigators were not placed in a superior position by detaining the clothes and possessions of the Petitioner in an evidencelocker for five years without a warrant, it is difficult and likewise inconceivable that the inclusion of the test results in the warrant application did not influence the judge's decision to issue a warrant or investigators decision to secure the warrant after they learned of the test results.

Remarkably, the Connecticut Supreme Court twice declined to address the issue of whether the transfer of Petitioner's property to the State Forensic Laboratory constituted an illegal seizure under the Fourth Amendment. The failure to address this issue was necessary in order to determine whether the Petitioner suffered a conversion or trespass to his property.

Ultimately, the Connecticut Supreme Court's failure to address the seizure issue resulted in the Petitioner being dispossesse of hisproperty without lawful process as req under the United States Constitution. To dat Petitioner's property taken by the State has not been taken with a warrant stated "with

particularity" as required by the Fourth Amendment since the warrant application makes no mention of Petitioner's wrist-watch alluded to by the Connecticut Supreme Court in a footnote of Petitioner's first appeal to that Court. 229 Conn. 10.

This case raises issues of national importance since the ruling in Joyce renders the Warrant Clause nugatory. According to the holding of the Connecticut Supreme Court, investigators could execute a warrant wherever they want and whenever they want so long as there is "probable cause" prior to the illegal intrusion. The Petitioner does not find this to be the holding of Murray and for these reasons respectfully requests this Court to issue a writ of certiorari to further define the parameters of the independent source doctrine.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

WALLACE L. JOYCE - PETITIONER

V.

STATE OF CONNECTICUT - RESPONDENT

CONCLUSION

WHEREFORE, and hereby, the undersigned Petitioner asks that the PETITION FOR WRIT OF CERTIORARI be granted.

Respectfully submitted,

Wallace L. Joyce

Wallace L. Joyce, Petitioner pro se

Date: March 10, 1998

The judgment of the Appellate Court is reversed and the case is remanded to that court for its consideration of the remaining issues raised by the plaintiff's appeal.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* WALLACE JOYCE (SC 15394)

Callahan, C. J., and Borden, Norcott, McDonald and Peters, Js.

Syllabus

Convicted, on retrial, of the crime of arson in the first degree, the defendant appealed to this court claiming, inter alia, that the trial court improperly denied his motion to suppress the results of the chemical testing of the clothing he had been wearing at the time of the fire in question. The tests were conducted pursuant to a search and seizure warrant that the state had obtained after this court had ruled in a prior appeal that the results of prior testing of his clothes, which had been conducted without a warrant, should have been suppressed as an illegal seizure. *Held:*

1. Contrary to the claim made by the defendant, the results of the second chemical testing was not derived from an illegal seizure of his clothes and, therefore, was not required to be excluded as the fruit of the poisonous tree; the cumulative effect of lawfully obtained independent information contained in the warrant application was sufficient to establish probable cause to test the defendant's clothes for evidence linking him to the arson.

2. The defendant could not prevail on his claim that, because the jury in his first trial acquitted him of violating the statute (§ 53a-111 [a] [3]) prohibiting the setting of a fire to collect insurance proceeds for the resultant loss, the trial court at his second trial was collaterally estopped from admitting evidence of insurance proceeds as a motive for the defendant to commit arson as defined by the statute (§ 53a-111 [a] [4]) applicable to causing a fire that subjects a peace officer or firefighter to a substantial risk of bodily injury; the trial court correctly determined that the difference in the relative burdens of proof between the statutory subdivisions permitted the admission of motive evidence here, the state

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Statutes § 22a-19 (a). See, e.g., *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 582. We note that there is no evidence in the record that the plaintiff would have been excluded from the property had she sought to attend the site inspection. In fact, General Statutes § 1-21 (a) provides in relevant part that "meetings of all public agencies . . . shall be open to the public. . . ."

not having to establish motive to convict the defendant under § 53a-111 (a) (4).

3. The defendant's constitutional right to due process was not violated by the failure of the police to preserve the liquid contents of a gasoline can found in the basement of the burned building; in light of the other evidence connecting the defendant to the crime and the persuasive evidence indicating that the liquid in the can was gasoline, the absence of that evidence did not prejudice the defendant.

4. The trial court did not abuse its discretion in limiting defense counsel's closing argument concerning the defendant's belief that a third party had committed the crime; having determined that the evidence could be admitted only to prove the defendant's state of mind and not to prove third party culpability, the trial court properly circumscribed defense counsel's emphasis on the third party as the culpable party.

5. The defendant's right to confront his accusers was not unduly restricted by the trial court's ruling precluding the defendant from cross-examining the investigating officers regarding his claim that a third party had committed the crime; the trial court, having determined that there was no direct evidence linking the third party to the crime, was properly concerned about the cumulative effect of the proffered testimony and its potential for confusing the jury.

6. The evidence presented was sufficient to support the defendant's conviction; viewing the evidence as a whole, the jury could reasonably have concluded that the defendant set the fire and that heavy smoke, gasoline vapors and the potential for combustion exposed firefighters to the risk of substantial injury.

(Two justices concurring separately)

Argued September 23—officially released November 25, 1997

Procedural History

Information charging the defendant with the crime of arson in the first degree, brought to the Superior Court in the judicial district of New Haven, where the court, *Freedman, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury before *Freedman, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

William H. Cashman, for the appellant (defendant).

Mitchell S. Brody, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's

attorney, and *Michael A. Pepper*, assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant appeals from a judgment of conviction of arson in the first degree in violation of General Statutes § 53a-111 (a) (4)[1] rendered after a jury trial. He appeals directly to this court pursuant to General Statutes § 51-199 (b).[2]

The defendant originally was convicted of the same crime in 1990,[3] but on appeal, this court concluded that the state's chemical testing of the defendant's burned clothing without a warrant constituted an unreasonable search in violation of article first, § 7, of the state constitution.[4] *State* v. *Joyce*, 229 Conn. 10, 27–28, 639 A.2d 1007 (1994). We reversed the defendant's conviction and ordered a new trial. After our decision in that case, the state applied for and obtained a search warrant to test the defendant's clothing, which was still in the custody of the Superior Court clerk's office.

The defendant now contends, on a number of grounds, that the trial court improperly failed to suppress the results of the chemical analysis conducted

[1] General Statutes § 53a-111 provides in relevant part: "Arson in the first degree: Class A felony. (a) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes an explosion, and . . . (3) such fire or explosion was caused for the purpose of collecting insurance proceeds for the resultant loss; or (4) at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury. . . ."

[2] General Statutes § 51-199 (b) provides in relevant part: "The following matters shall be taken directly to the Supreme Court . . . (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years . . . ."

[3] The defendant was acquitted of violating § 53a-111 (a) (3). See footnote 1.

[4] The constitution of Connecticut, article first, § 7, provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to

pursuant to the search warrant in violation of the fourth amendment to the United States constitution and article first, § 7, of the state constitution. The defendant also claims that: (1) the state was collaterally estopped from introducing evidence of insurance proceeds as a motive for the defendant to commit arson; (2) the state's failure to preserve the contents of a gasoline can found on the premises violated his right to due process under the state and federal constitutions; (3) the trial court improperly restricted the defendant's closing argument in violation of his sixth amendment right to effective counsel; (4) the trial court improperly precluded him from cross-examining the fire marshall regarding the adequacy of the investigation of a third party; and (5) there was insufficient evidence to support his conviction. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On January 29, 1990, Patricia Altrui and John Donroe were sitting in the living room of their home at 128 Maple Street, East Haven. Their living room has a picture window that overlooks 125 Maple Street. The house at 125 Maple Street had been unoccupied since the death of its owner, Lawrence Joyce, the defendant's father. At approximately 3:45 p.m., Altrui noticed that the front door to the house was partially open and that it remained open for approximately ten minutes. At approximately 4 p.m., Donroe also observed that the front door was open. It remained open for approximately two to three more minutes before he heard a "whooshing" sound. Altrui heard the sound as well. Both Altrui and Donroe looked across the street and saw an orange glow in the picture window of the house and a man in flames run out of the house and down the embankment to the river. Firefighters and paramedics arrived in response to a 911 call by Altrui and Donroe

seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

reporting that there had been an explosion at 125 Maple Street. When firefighter paramedic Charles Licata arrived, the defendant was standing in a nearby river, waist deep in water. The defendant appeared to be severely burned. When Licata asked him what had happened, the defendant stated that he had entered the house and that there was an explosion. He was not sure if he had been blown out of the house, or if he had run out of the house to the river. Licata helped the defendant out of the water and up onto an embankment. The defendant's clothing was burned and smoldering. He had first, second and third degree burns over approximately 40 percent of his body. His hands were degloved, meaning that the skin was intact but was hanging off his hands. Licata cut off all the defendant's clothing in order to treat his injuries and placed it on the ground by the side of the road. Licata told Detectives Paul Hemingway and Bruce Scobie that the defendant's clothing had been left by the side of the road. After being treated at the scene, the defendant was transported by ambulance to Yale-New Haven Hospital. Scobie put the clothes in the trunk of a police car so that they would not be lost or thrown out.

Licata and Hemingway rode in the ambulance with the defendant to the hospital. In the emergency room, Hemingway identified himself and asked the defendant what had happened. The defendant said he had opened up the door and there was an explosion. Hemingway then asked the defendant if he had a car. The defendant stated that he had a pickup truck and that it was parked in the parking lot of the Professional Building on Route 80 in East Haven. Hemingway asked the defendant why the car was parked elsewhere, and the defendant responded that he had experienced mechanical problems. The conversation lasted only one minute because of the defendant's condition. Hemingway also spoke

with the defendant's wife and informed her about the fire and the vehicle.

Pursuant to a search warrant, the clothes were taken to the state laboratory to be tested.[5] A gas chromatography analysis was performed on the defendant's clothing on January 12, 1995. The presence of gasoline was found on the defendant's jeans, a boot and his belt. Prior to trial the defendant moved to suppress the results of the tests. After an evidentiary hearing, the trial court denied the motion.

During trial, the defendant testified that on the day of the fire, he was working as a handyman in Clinton. He left for home at 3:25 p.m., driving on Interstate 95 to the Cedar Street exit. After he exited the highway and entered the hilly section of Cedar Street, his truck began to buck heavily. It continued to buck as he drove along Route 80. He pulled off Route 80 and parked his vehicle at the Professional Building. The defendant then walked to the house at 125 Maple Street, which was two tenths of one mile away, to call his family for a ride. Upon reaching the house, he noticed that the pantry window was open and that there was a ladder leaning against the side of the house. After unlocking the door and disengaging the alarm, he turned on the dimmer switch and immediately thereafter flames hit him.

The jury found the defendant guilty as charged. Thereafter, the trial court denied the defendant's motions for acquittal and a new trial. This appeal followed. Additional facts will be discussed as they become relevant in the context of the defendant's specific claims.

[5] The warrant was served on the clerk's office in New Haven Superior Court where the clothes had been kept as exhibits in evidence containers since the first trial in 1990.

I

The defendant claims that the trial court improperly failed to suppress the results of the 1995 gas chromatography tests of his clothing. The defendant argues that the chemical analysis was derived from the illegal seizure of his clothing, and should be excluded as fruit of the poisonous tree. See *Wong Sun* v. *United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Specifically, the defendant contends that: (1) the warrant affidavit contained references to the first chemical analysis; (2) the state's retention of the clothing following our decision in *State* v. *Joyce*, supra, 229 Conn. 10, constituted an illegal seizure; and (3) the initial transmittal of the clothing in 1990 to the state laboratory for chemical analysis was an illegal seizure that tainted the subsequent testing.[6]

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . Practice Book § 4061; *State* v. *Oquendo*, 223 Conn. 635, 645, 613 A.2d 1300 (1992); *State* v. *Kyles*, 221 Conn. 643, 660, 607 A.2d 355 (1992). [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Colvin*, 241 Conn. 650, 656, 697 A.2d 1122 (1997).

The defendant first claims that the affidavit in support of the warrant contained evidence derived from the

[6] Because the defendant has not provided a separate and distinct analysis of his search and seizure claim under the state constitution, we address only his federal constitutional claim. See *State* v. *Robinson*, 237 Conn. 238, 243 n.5, 676 A.2d 384 (1996); *State* v. *Hinton*, 227 Conn. 301, 322 n.23, 630

original illegal search. Additionally, he claims that the evidence is not admissible under the independent source doctrine because, with the offending references removed, the warrant to transmit the clothing for testing was not supported by probable cause. We disagree.

At the suppression hearing, the trial court, sua sponte, excised references to the illegal search contained in the warrant affidavit.[7] The court held that, without the references to the illegal search, the warrant nonetheless contained sufficient lawfully obtained evidence to establish probable cause to test the defendant's clothing.

Our disposition of this issue turns on the application of the independent source doctrine. It is well recognized

A.2d 593 (1993); *State* v. *Gonzalez*, 206 Conn. 391, 393–94 n.2, 538 A.2d 210 (1988).

[7] The trial court stated that it did not consider the following paragraphs from the affidavit:

"On January 30, 1990, Fire Marshall [Frederick] Brow transported wood and carpet samples from the fire scene, as well as [the defendant's] clothing to the state forensic laboratory in Meriden for chemical testing with the exception of [the defendant's] jeans and undershirt, which he transported two days later. A report dated February 29, 1990 from the state lab indicated that analysis of the submitted items revealed the 'presence of a petroleum based distillate similar to gasoline' on the fire scene samples and on the shirt, shoes, socks, and jeans worn by [the defendant]. This report was signed by Jack Hubbal, Ph.D., the leading criminalist with the lab.

"[The defendant] was arrested for arson by a warrant issued on March 3, 1990.

"Jury selection for this trial began in October of 1990 in New Haven Superior Court, part A, 235 Church Street, New Haven. At trial, Jack Hubbal testified regarding the analysis conducted on [the defendant's] clothing and his findings.

"[The defendant's] clothes were introduced by the State as full exhibits. [The defendant] was convicted on November 27, 1990 of Arson, First Degree, General Statutes § 53a-111 (a) (4). [The defendant] appealed and the Appellate Court affirmed. The Supreme Court granted certification and reversed the conviction holding that the warrantless chemical analysis of [the defendant's] clothing constituted an unconstitutional search under article first, § 7, of the state constitution and should have been suppressed. *State* v. *Joyce*, [supra, 229 Conn. 10]."

that "the exclusionary rule has no application [where] the [g]overnment learned of the evidence from an independent source." (Internal quotation marks omitted.) *Segura* v. *United States*, 468 U.S. 796, 805, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); see *Wong Sun* v. *United States*, supra, 371 U.S. 485; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920). "Independent source, in the exclusionary rule context, means that the tainted evidence was obtained, 'in fact,' by a search untainted by illegal police activity. *Murray* v. *United States*, 487 U.S. 533, 539, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)." *State* v. *Vivo*, 241 Conn. 665, 672–73, 697 A.2d 1130 (1997). The doctrine is based on the premise that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . In the case of a search conducted pursuant to a search warrant, [t]he two elements that must be satisfied to allow admission [under the independent source doctrine] are: (1) the warrant must be supported by probable cause derived from sources independent of the illegal entry; and (2) the decision to seek the warrant may not be prompted by information gleaned from the illegal conduct.[8] *United States* v. *Johnson*, 994 F.2d 980, 987 (2d Cir. 1993); *Murray* v. *United States*, supra, [542]." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Vivo*, supra, 672–73.

With these principles in mind, our inquiry turns to whether the lawfully obtained evidence in the warrant is sufficient to establish probable cause. See *State* v.

[8] The defendant does not argue that the decision to seek the warrant was prompted by the results of the chemical tests. Clearly, the state's decision to seek a warrant was a result of our holding in *State* v. *Joyce*, supra, 229 Conn. 10. Accordingly we limit our discussion to the first element.

Ostroski, 201 Conn. 534, 544, 518 A.2d 915 (1986). In the application for the search and seizure warrant, the affidavit disclosed, inter alia, the following facts.[9] The house at 125 Maple Street was unoccupied at the time of the fire and had been owned by the defendant's deceased father. At approximately 4:05 p.m., Donroe, a neighbor, noticed that the door was partially open. He observed the house for a few minutes and then the explosion occurred. The defendant was seen running from the burning house with his clothes on fire. The defendant told Donroe, who came to assist him, and he later told Hemingway, that the explosion had occurred when he opened the door. The defendant suffered first, second and third degree burns on the front part of his body, including his hands, face, chest and legs. His clothes were cut off in order to facilitate his medical treatment and were left on the street. Scobie collected the clothes with the intention of returning them to the defendant. At the hospital, the defendant told Hemingway that he had left his vehicle in a parking lot due to mechanical problems and had walked to 125 Maple Street. The parking lot is approximately five blocks from the house. The defendant's vehicle was parked within 500 feet of a public pay phone and a fire department, where a phone was available.

There was no sign of forced entry, and the alarm system, which was in operation, did not sound. The defendant had keys to both the door and the alarm. Upon entering the house, the Fire Marshall Frederick Brow detected the odor of gasoline. Five separate and distinct points of fire origin were discovered, with one being in the first floor living room. "Knock out plugs" had been removed and candles had been placed in the holes. Brow classified the fire as an arson.

[9] The defendant does not contest that these facts were established independent of the initial, illegal search.

It is well settled that "[p]robable cause to search exists if: (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Findings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . .

"In determining the existence of probable cause to search, the issuing magistrate assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . We view the information in the affidavit in the light most favorable to upholding the magistrate's determination of probable cause. . . . In a doubtful or marginal case . . . our constitutional preference for a judicial determination of probable cause leads us to afford deference to the [issuing judge's] determination." (Internal quotation marks omitted.) *State* v. *Bova*, 240 Conn. 210, 231–32, 690 A.2d 1370 (1997).

The affidavit stated that Brow concluded that the fire was an arson. The affidavit also revealed that the witnesses' account of the timing of the explosion squarely contradicted the defendant's. There was no sign of forced entry and the defendant had keys to the house and alarm system, which did not sound. It could be inferred that his explanation for parking his vehicle in a parking lot and walking to the house to use the phone was implausible in light of the access he had to pay phones and the short distance he had to drive to get to the house, coupled with the fact that he had

already driven the vehicle twenty-one miles. We agree with the state that the cumulative effect of this information sufficiently established the requisite probable cause that the defendant's clothing contained evidence linking him to the arson.

The defendant next claims that the state's possession of his clothing after our decision in *Joyce* constituted an illegal seizure.[10] The defendant reads our decision in *Joyce* to mandate that his April 16, 1990 motion to suppress should have been granted. He reasons that the decision implicitly required the *return* of his clothing, rather than simply the suppression of the first test results, because the motion to suppress requested the return of the clothing. Therefore, he asserts the failure to return the clothing after the decision was in violation of this court's holding, and constituted an illegal seizure.

The defendant offers no authority for the novel proposition that, despite our silence on the matter, our decision in *Joyce* granted all the forms of relief requested in the underlying procedural motion. The plain language of our decision in *Joyce* was limited to the determination of whether the chemical analysis constituted an illegal search. We decline the defendant's invitation to read into our decision an order to return the clothing not contained in, nor supported by, the text.

The defendant's final argument with regard to the motion to suppress is that the initial transfer of his clothing to the state laboratory in 1990 was an illegal seizure and that the subsequent possession and testing were the fruit of the poisonous tree.[11] Specifically, the defendant maintains that "the state would not have had

[10] The clothing remained in the clerk's office since the trial in 1990. See footnote 5. We note that there is no evidence that the defendant requested the return of the clothing after our decision in *Joyce*.

[11] The trial court did not make a determination as to whether the initial transfer of the clothing to the state laboratory constituted an illegal seizure.

the clothing at all, but for that initial illegal seizure." The defendant concedes that when the police initially took possession of the clothing, it was to prevent theft or loss and was pursuant to their community caretaking function. *Cady* v. *Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973); *State* v. *Tully*, 166 Conn. 126, 136–38, 348 A.2d 603 (1974). The defendant argues, however, that the illegal seizure occurred when the detective delivered the items to Brow to take to the state laboratory for chemical analysis. In *Joyce*, we did not reach the issue of whether the transmittal of the clothing to the laboratory for testing, while in the lawful custody of the police under their community caretaking function, constituted a seizure. *State* v. *Joyce*, supra, 229 Conn. 18 n.11. Because we conclude that there was an independent basis for the possession and testing of the clothing, we refrain from reaching the issue we left open in *Joyce*.

The defendant argues that the clothing must be returned to him in order to effect a constitutional reseizure, and he offers *United States* v. *Silvestri*, 787 F.2d 736, 739 (1st Cir. 1986), cert. denied, 487 U.S. 1233, 108 S. Ct. 2897, 101 L. Ed. 2d 931 (1988), as authority for this proposition. In that case, the Court of Appeals for the First Circuit stated: "Tangible objects . . . are susceptible to seizure and once seized cannot be cleanly reseized without returning the objects to private control." Id. The defendant contends that the United States Supreme Court adopted this principle in *Murray* v. *United States*, supra, 487 U.S. 541–42. In response, the state argues that the Supreme Court rejected the "deseizure" requirement of *Silvestri*, and held instead that the independent source doctrine applies equally to the reseizure of tangible evidence. Id. The state contends that whether the initial seizure was illegal is irrelevant to the admissibility of the challenged evidence during the retrial because it had an independent source,

namely, a warrant supported by probable cause, for the possession and testing of the clothing. We agree with the state.

We consider *Murray* instructive in our consideration of the defendant's claim. In *Murray*, government agents illegally entered a warehouse and saw in plain view burlap-wrapped bales they suspected contained marijuana. They did not mention the prior entry and did not rely on observations made during that entry in their application for a subsequent warrant. The Supreme Court held that so long as the knowledge that the marijuana was in the warehouse existed at the time of the entry pursuant to the warrant and "was not the result of the earlier entry there is no reason why the independent source doctrine should not apply." Id., 541.

The relevant language in *Murray* regarding the reacquisition of tangible evidence previously illegally seized provides as follows: "The First Circuit has discerned a difference between tangible and intangible evidence that has been tainted, in that objects 'once seized cannot be cleanly reseized without returning the objects to private control.' *United States* v. *Silvestri*, [supra, 787 F.2d 739]. It seems to us, however, that reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. . . . So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply." *Murray* v. *United States*, supra, 487 U.S. 541–42.

The defendant argues that *Murray* indicates that, where the state does not relinquish an illegally obtained possession, a later lawful seizure is unattainable because there is no "attenuation of th[e] initial illegality . . . ." Even if we were to assume, arguendo, that an

illegal seizure arose from the transmittal of the clothing to the state laboratory, we do not construe *Murray* necessarily to require the return of the defendant's clothing in order to effect a constitutional seizure. Rather, in the circumstances of this case "the ultimate question" posed by *Murray* is whether the search and seizure pursuant to a warrant were "in fact a genuinely independent source" of the 1995 gas chromatography test results. Id., 542. We already have answered this inquiry in the affirmative previously in this opinion, wherein we concluded that the operative facts in the affidavit were all in the possession of the authorities before the allegedly illegal seizure and those facts constituted probable cause to support the warrant. Moreover, the suppression of the chemical analysis is not warranted because the defendant's clothing were not seized as a result of alleged police misconduct. Here, the search warrant, supported by probable cause unrelated to any purported illegal conduct by the police, constituted an independent source. We conclude, therefore, that the trial court properly denied the defendant's motion to suppress.

Further, we note that "[t]he defendant's position contravenes the exclusionary rule's purpose of ensuring fairness and balancing the interests of the state and the defendant. Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." (Citation omitted; internal quotation marks omitted.) *State* v. *Colvin*, supra, 241 Conn. 660.

If we were to adopt the defendant's position and suppress the chemical analysis as the fruit of an illegal seizure, "we would place the police in a worse position

than they would have been if the allegedly unlawful police conduct had not occurred"; id.; because if the allegedly unlawful seizure had not occurred, the police would have been free to obtain a warrant to transmit the clothing to the state laboratory for testing.

II

The defendant next claims that the trial court was collaterally estopped from admitting evidence of insurance proceeds as a motive for the defendant to commit arson.[12] The defendant contends that, by acquitting him of a violation of § 53a-111 (a) (3), the jury in his first trial necessarily determined that he did not commit arson for the purpose of collecting insurance proceeds. Therefore, he argues, the state should have been precluded from introducing the evidence of insurance proceeds at his second trial. We disagree. As the state aptly points out, the principles of collateral estoppel do not preclude admission of the evidence because motive is not an ultimate issue or element of § 53a-111 (a) (4) and, therefore, the standard of proof regarding the motive is not beyond a reasonable doubt, as it was in the defendant's earlier prosecution under § 53a-111 (a) (3).

As a preliminary matter, we observe that "[i]n a criminal case, collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. *Ashe* v. *Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Id., 443. Collateral estoppel . . . may bar prosecution or argumentation of facts necessarily established in a prior proceeding . . . . To establish whether

[12] The house at 125 Maple Street was insured under a homeowner's policy.

collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the government is attempting to relitigate those facts in the second proceeding." (Citations omitted; internal quotation marks omitted.) *State* v. *Hope*, 215 Conn. 570, 584, 577 A.2d 1000 (1990), cert. denied, 498 U.S. 1089, 111 S. Ct. 968, 112 L. Ed. 2d 1054 (1991).

The defendant concedes that motive is not an element of § 53a-111 (a) (4). He contends, however, that under the circumstances of this case, the motive of committing arson for the purpose of collecting insurance proceeds must be proven beyond a reasonable doubt because it is relevant to establishing the defendant as the perpetrator and his intent to commit the crime.

It is axiomatic that the elements of a crime must be proven beyond a reasonable doubt. *United States* v. *Gaudin*, 515 U.S. 506, 509–10, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). This standard of proof extends to underlying facts deemed essential to proof of an element. "Where a group of facts are relied upon for proof of an element of the crime it is their *cumulative impact* that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard. It is only where a single fact is essential to proof of an element, however, such as identification by means of fingerprint evidence, that such evidence must support the inference of that fact beyond a reasonable doubt." (Emphasis added.) *State* v. *McDonough*, 205 Conn. 352, 355, 533 A.2d 857 (1987), cert. denied, 485 U.S. 906, 108 S. Ct. 1079, 99 L. Ed. 2d 238 (1988). The defendant argues that his motive falls into this category and already has been resolved by his acquittal.

We begin our analysis with an examination of the statutes. At the defendant's first trial, when he was

charged with arson in violation of § 53a-111 (a) (3), the state had the burden of proving beyond a reasonable doubt that the defendant committed arson "for the purpose of collecting insurance proceeds for the resultant loss . . . ." In this second trial he was charged with a violation of § 53a-111 (a) (4). That section does not require proof of the specific intent of collecting insurance proceeds but, rather, requires proof that "at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury." We have stated that, except where it is specifically an element of the crime, as in § 53a-111 (a) (3), the state does not have to establish a motive to convict an accused of arson. *State* v. *Gray*, 221 Conn. 713, 722, 607 A.2d 391, cert. denied, 506 U.S. 872, 113 S. Ct. 207, 121 L. Ed. 2d 148 (1992); *State* v. *Famiglietti*, 219 Conn. 605, 614–15, 595 A.2d 306 (1991); *State* v. *Ruffin*, 206 Conn. 678, 681, 539 A.2d 144 (1988); *State* v. *Pisano*, 107 Conn. 630, 632, 141 A. 660 (1928). "[T]he state is under no obligation to show a motive of the accused to commit the crime charged. . . . Proof of motive is never necessary to support a conclusion of guilt otherwise sufficiently established, however significant its presence or absence, or its sufficiency, may be as bearing upon the issue of guilt or innocence. . . . The presence or absence of motive . . . is a circumstance to be weighed with other evidence for the jury to consider." (Citations omitted; internal quotation marks omitted.) *State* v. *Ruffin*, supra, 681. Accordingly, if the state offers evidence regarding motive, it need not be proven beyond a reasonable doubt. The trial court was correct in determining that the difference in the relative burdens of proof permitted the admission of this evidence.

III

The defendant next claims that the failure of the state to preserve the contents of the gasoline can found in the basement of 125 Maple Street denied him a fair trial

in violation of his due process rights under the state and federal constitutions.[13] We disagree.

The following additional facts are relevant to our disposition of this issue. Brow saw and retrieved a red metal five gallon gasoline can from the basement of the house at 125 Maple Street. There was liquid in the can that smelled like gasoline. Brow did not find any other containers on the premises capable of carrying gasoline. He thought it was possible that such a container could have been brought into the house and consumed in the fire. Although Brow could not remember precisely when he brought the gasoline can to the state's attorney's office, he testified that there was liquid in the can at the time. No tests were conducted on the contents of the can. At the time of trial, the can no longer contained any liquid.

The defendant contends that his federal and state constitutional rights were violated by the state's failure to preserve the liquid in the can. Because the record contains no evidence of bad faith on the part of the police in failing to preserve the liquid, as required under the federal standard set forth in *Arizona* v. *Youngblood*, 488 U.S. 51, 56, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988),[14] we focus our analysis on the defendant's state constitutional claim. See *State* v. *Valentine*, 240 Conn. 395, 416–17, 692 A.2d 727 (1997).

"We have recently enunciated the standard for determining whether the failure of the police to preserve evidence constitutes a due process violation

[13] The constitution of Connecticut, article first, § 8, provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[14] "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the

under our state constitution. In *State* v. *Morales*, 232 Conn. 707, 727, 657 A.2d 585 (1995), we rejected the federal standard of *Arizona* v. *Youngblood*, supra, 488 U.S. 51, and held that, under our state constitution, the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process of law. Rather, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must employ the [*State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985)] balancing test, weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence." (Internal quotation marks omitted.) *State* v. *Valentine*, supra, 240 Conn. 417. Applying these factors to the present case, we conclude that the defendant's due process rights under our state constitution were not violated by the failure of the police to preserve the liquid contents of the can.

First, the liquid in the gasoline can was not material evidence. "The measure of materiality is whether 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Id., 417–18. In the present case, the defendant argues that the liquid was material to the state's case because, if it was not gasoline, then

exculpatory value of the evidence at the time it was lost or destroyed." *Arizona* v. *Youngblood*, supra, 488 U.S. 56–57 n.*.

the gasoline must have been poured prior to the defendant's arrival at the house and, therefore, his presence at the house at the time of the fire was "much less harmful." We are unpersuaded that the liquid constituted material evidence. The defendant's argument that the liquid was "highly relevant" is undermined by the fact that there was no evidence that the defendant ever requested a test. Although the defendant's failure to seek production of evidence does not relieve the state of the obligation to preserve that evidence, "[t]he fact that a defendant failed to request the evidence goes to the issue of materiality and whether the defendant deemed it significant." *State* v. *Morales*, supra, 232 Conn. 712 n.7. The state's theory that the defendant was burned while lighting the fire was plausible regardless of when the accelerant was actually spread. Even if the liquid was not gasoline, that fact does not preclude the possibility that either the defendant poured it at an earlier time and removed the container or used a different container that was then destroyed in the fire. Finally, considering Brow's testimony that the contents of the can smelled like gasoline and that certain of the defendant's clothing tested positive for a substance similar to gasoline, it appears unlikely that the liquid was anything other than gasoline. In light of these circumstances, we agree with the trial court's determination that it was pure speculation that preservation and testing of the liquid would have helped the defendant's case. We conclude that the presence of the liquid at trial would not have been sufficient to cast reasonable doubt on the defendant's guilt.

Second, there was little likelihood of mistaken assessment of the liquid. The trial court properly held that, in light of Brow's testimony, it was improbable that the liquid was anything other than gasoline and, therefore, the possibility of misinterpretation was minimal.

Third, it is clear from the record that the state did not preserve the liquid because it did not consider such evidence a significant factor in the prosecution. The defendant concedes that there is no evidence indicating that the liquid was disposed of deliberately. To the contrary, the trial court noted that the state actually had a "strong interest" to preserve the liquid as it likely would have bolstered its case. The trial court found credible the state's claim that the liquid likely evaporated during the five years since the fire.

Finally, any prejudice to the defendant was minimal. In measuring the degree of prejudice to an accused caused by the unavailability of the evidence, a proper consideration is "the strength or weakness of the state's case, as well as the corresponding strength or weakness of the defendant's case." Id., 727 n.22. The trial court commented that, because the probability was so great that the liquid was gasoline, the defendant "actually benefitted from the absence of the liquid." The court also noted that the defendant thoroughly cross-examined Brow and brought to the jury's attention that the liquid was neither preserved nor tested. In light of the state's other evidence connecting the defendant to the crime and the persuasive evidence indicating that the liquid was gasoline, we conclude that the absence of the liquid did not prejudice the defendant.

IV

The defendant next claims that the trial court improperly restricted defense counsel from commenting in final argument on certain facts that had been elicited from the defendant during redirect examination, thereby violating his right to the effective assistance of counsel under the sixth amendment to the United States constitution.[15] This claim is without merit.

[15] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right—

The following facts are relevant to our consideration of the defendant's claim. During trial the defendant sought to introduce evidence indicating that he believed that a third party, David Thomas, a named beneficiary of the defendant's deceased father's will and holder of a life estate in the house, had committed the arson. Because of the lack of direct evidence connecting Thomas to the crime, the trial court denied the admission of evidence of third party culpability.[16] During cross-examination, the defendant indicated that he believed that someone else set the fire. After hearing argument, the trial court permitted defense counsel to introduce evidence during redirect examination showing the basis of the defendant's belief. The defendant testified that he believed someone else set the fire because Thomas had told him that he was going to burn down the house. After this testimony, the trial court instructed the jury that the evidence was offered not as third party culpability but to show the defendant's state of mind.[17]

During final argument, defense counsel amplified the defendant's testimony about the threat by Thomas to

. . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

[16] The defendant does not challenge this ruling on appeal. The standard for the admissibility of third party culpability evidence in Connecticut is governed by the rules relating to relevancy and requires that the defendant show "some evidence which directly connects a third party to the crime with which the defendant is charged. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." *State* v. *Boles*, 223 Conn. 535, 548–49, 613 A.2d 770 (1992).

[17] The trial court's complete instruction regarding the evidence provided: "Ladies and gentlemen, this evidence is, once again, not offered for the truth of the matter asserted. It is offered to show the state of mind of this witness and that's the only purpose for which you can use it. And when I say the only purpose [for] which you can use it, there is no direct evidence in this case of third party culpability. And because of that, this is not evidence of third party culpability. Do you understand that?"

burn the house. On the basis that defense counsel was actually arguing third party culpability, the state objected to statements by defense counsel that (1) Thomas did not testify at the trial, and (2) Thomas threatened to burn the house and that is what happened.[18]

We recognize that "[t]he right to the assistance of counsel ensures an opportunity to participate fully and fairly in the adversary factfinding process. . . . The opportunity for the defense to make a closing argument in a criminal trial has been held to be a basic element of the adversary process and, therefore, constitutionally protected under the sixth and fourteenth amendments. . . . Closing argument is an integral part of any criminal trial, for it is in this phase that the issues are sharpened and clarified for the jury and each party may present his theory of the case. Only then can [counsel] . . . argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." (Citations omitted; internal quotation marks omitted.) *State* v. *Arline*, 223 Conn. 52, 63, 612 A.2d 755 (1992).

"[T]he scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument

[18] The specific statements made by defense counsel in final argument, to which the state objected, were:

"Mr. Cashman [Defense Counsel]: . . . Now that statement was never disputed by David Thomas. And you remember when [Michael Pepper, assistant state's attorney] . . . said, 'Well, isn't it your word against Mr. Thomas' word?' And I objected because Mr. Thomas has never said anything in this trial and still hasn't.

* * *

"Mr. Cashman: . . . [The defendant] knows he didn't do it. So of course somebody else had to. And when he testified he said David Thomas. And

to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations. . . . While we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue." (Citations omitted; internal quotation marks omitted.) Id., 59–60.

The defendant argues that because of the limitations imposed on his final argument, he was unable to rehabilitate his credibility regarding why he believed someone else had committed the crime. We are unpersuaded that the defendant was precluded from raising a significant issue in final argument. The defendant was permitted to testify why he believed someone else committed the crime and counsel was able to comment in final argument about the basis of the defendant's belief. Having already determined that the evidence could not be admitted to prove third party culpability, the trial court did not abuse its discretion by circumscribing counsel's emphasis on Thomas as the culpable party.

V

The defendant's other sixth amendment claim is that the trial court improperly restricted his cross-examination of Brow and Scobie in violation of his right to confront his accusers. The defendant contends that the trial court impermissibly limited his cross-examination of these witnesses regarding their allegedly inadequate investigation of Thomas as the responsible party.

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he had reason to believe that because of the threat that was made. And I would suggest to you that if somebody said, 'I am going to burn your car,' and then your car was—

"Mr. Pepper: Judge, I've got to continue to object."

On motion of the defendant, the trial court allowed the defendant to make an offer of proof regarding the testimony he sought to elicit from these witnesses. On voir dire examination by the defendant, Brow acknowledged that Thomas had admitted to Scobie and Brow that Thomas had threatened to burn the property. Brow further testified that he could not remember where Thomas said he had been on the night of the fire. The defendant also inquired if Brow knew that Thomas had a life use of the house and was listed as a beneficiary in the will, to which Brow responded in the affirmative. The defendant argued that he was entitled to pursue this line of questioning because it was relevant to his argument that the state's investigation was inadequate and "negligent." The trial court concluded that the proffered evidence should not be admitted because: (1) it was redundant, in that counsel had "already shown to a large degree the ineffectiveness of [the] investigation"; and (2) it constituted evidence of third party culpability without the required direct connection to the crime.

"It is axiomatic that the defendant is entitled fairly and fully to confront and to cross-examine the witnesses against him. . . . The confrontation clause does not, however, suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Barnes*, 232 Conn. 740, 745–46, 657 A.2d 611 (1995). " 'In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial.' " *State* v. *Bova*, supra, 240 Conn. 219. With

these principles in mind, we now turn to the defendant's claim.

We agree with the state that the trial court properly precluded the defendant from pursuing this line of inquiry. The court previously had determined that there was no direct evidence linking Thomas to the crime. The defendant had conducted a thorough cross-examination of Brow about the investigation and had stressed deficiencies in the process such as the failure to fingerprint the gasoline can and to preserve the contents. The trial court properly was concerned about the potential effect of this testimony to confuse the jury. Accordingly, we reject the defendant's claim that the trial court improperly restricted his cross-examination of Brow and Scobie.

VI

The defendant's final claim is that there was insufficient evidence to support his conviction. He concedes that the fire was deliberately set. He contends, however, that the state failed to establish, beyond a reasonable doubt, that: (1) he was the person criminally responsible for setting the fire; and (2) firefighters at the scene were subjected to a substantial risk of injury. We disagree.

"The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt.

. . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . [W]e must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *James*, 237 Conn. 390, 435–36, 678 A.2d 1338 (1996).

Viewing the cumulative effect of all the evidence, we are persuaded that the jury reasonably could have found that the defendant set the fire and was burned when the vapors ignited. It was undisputed that the defendant was the only one present in the house just before the explosion. See *State* v. *Gray*, supra, 221 Conn. 722 (presence of accused shortly before start of fire is probative of identity); *State* v. *Famiglietti*, supra, 219 Conn. 614 (same). His testimony that the explosion occurred as soon as he opened the door contradicted the testimony of Altrui and Donroe who stated that the door was open for some minutes before the explosion occurred. There was medical testimony that the injuries to the defendant's hands were consistent with being in the area of ignition. Chemical analysis revealed that gasoline was present on the defendant's boot, jeans and belt. He parked his vehicle at the Professional Building because it was bucking. A service technician testified that he test drove and physically inspected the vehicle, and could not find any mechanical problems. The state presented evidence that during the time his vehicle was allegedly bucking the defendant passed several service

stations. He walked two tenths of one mile to 125 Maple Street to call his son for a ride when his vehicle was parked approximately 400 feet from a public pay phone. It is reasonable to infer from the jury's verdict that it accepted the testimony offered by the state and rejected the testimony offered by the defendant. Accordingly, we reject the defendant's contention that the evidence was legally insufficient to implicate him in the crime.

The defendant also challenges his conviction on the basis that there was insufficient evidence to prove beyond a reasonable doubt that the fire posed a "substantial risk of bodily injury" as required under § 53a-111 (a) (4). "The statute requires proof of a risk of substantial injury, not serious injury in fact." *State* v. *Famiglietti*, supra, 219 Conn. 615.

Lou Camera, the first firefighter on the scene, testified that when he arrived on the scene there was heavy smoke coming from the front door of the house. He did not know whether the house was occupied, and he assumed there were people inside. He entered alone, with full equipment including air mask and gloves, carrying a water line. There were two fires in the living room, the largest with flames six to seven feet high. There was also a smaller fire in the dining room. Both rooms and the foyer were full of heavy smoke. When he removed his mask, he detected a chemical smell. Upon arrival, Brow investigated the house. In the basement, he saw a red five gallon gasoline can and noticed that the water on the floor had a petroleum shine. He also smelled an odor similar to gasoline. Concerned about the possibility of an explosion, Brow told the firefighters to vacate the house until it could be adequately ventilated. We conclude that the evidence of heavy smoke, gasoline vapors, and the potential for combustion was sufficient for the jury to find beyond a reasonable doubt that firefighters were exposed to a risk of substantial injury.

The judgment is affirmed.

In this opinion BORDEN and PETERS, Js., concurred.

CALLAHAN, C. J., with whom MCDONALD, J., joins, concurring. I concur with the result reached by the majority. I wish to reiterate, however, the opinion expressed in my dissent in *State* v. *Joyce*, 229 Conn. 10, 28, 639 A.2d 1007 (1994), i.e., that the defendant had no reasonable expectation of privacy in his charred clothing that was retrieved by the police from the roadside. I believe, therefore, that the original chemical testing of the defendant's clothing was constitutionally permissible and the results admissible.

ORVILLE COLEY *v.* CAMDEN ASSOCIATES, INC., ET AL.
(SC 15738)

Callahan, C. J., and Borden, Berdon, Norcott, Katz, Palmer and McDonald, Js.

Syllabus

The defendant second injury fund appealed from a decision by the workers' compensation review board affirming the transfer to the fund of liability for a certain claimant's workers' compensation benefits during the pendency of an appeal by the claimant's employer and the employer's insurer. *Held:*

1. The employer's insurer could not prevail on its claim that the appeal should be dismissed for lack of a final judgment; the decision from which the fund appealed was separate and independent from the appeal by the employer and the insurer from the underlying award of benefits.
2. The board improperly determined that the public act (P.A. 95-277, § 9 [f], now codified at § 31-301 [f]) eliminating the fund's responsibility for payment of benefits during the pendency of an appeal from an award of benefits, and shifting that obligation to the claimant's employer or its insurer, was intended to operate prospectively only; the purpose of that public act, which was procedural in nature and did not effect a change in the parties' substantive rights, was to overhaul the workers' compensation system and specifically to reduce the financial burden on the fund, and an interpretation of that act as having prospective effect only would seriously undermine the legislature's purpose and be

STATE OF CONNECTICUT

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O R D E R

THE MOTION OF THE DEFENDANT, FILED DECEMBER 2, 1997, FOR REARGUMENT AND FOR EN BANC REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

s/FRANCIS J. DRUMM, JR.
CHIEF CLERK

NOTICE SENT: DECEMBER 11, 1997.
WILLIAM H. CASHMAN & ASSOCIATES
MITCHELL S. BRODY, ASSISTANT STATE'S ATTORNEY
CLERK, NEW HAVEN J.D. (CR90-0097459)
HON. SAMUEL S. FREEDMAN
RJD

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 15394

STATE OF CONNECTICUT

V.

WALLACE JOYCE : DECEMBER 10, 1997

O R D E R

THE MOTION OF THE DEFENDANT, FILED PRO SE ON DECEMBER 5, 1997, FOR LEAVE TO AMEND DEFENDANT-APPELLANT'S MOTION FOR REARGUMENT AND FOR EN BANC REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DISMISSED.

BY THE COURT,

s/FRANCIS J. DRUMM, JR.
CHIEF CLERK

NOTICE SENT: DECEMBER 11, 1997.
WALLACE L. JOYCE
WILLIAM H. CASHMAN & ASSOCIATES
MITCHELL S. BRODY, ASSISTANT STATE'S ATTORNEY
CLERK, NEW HAVEN J.D. (CR90-0097459)
HON. SAMUEL S. FREEDMAN
RJD

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WALLACE L. JOYCE - PETITIONER

V.

STATE OF CONNECTICUT - RESPONDENT

PROOF OF SERVICE

I, Rose M. Joyce, of 506 Quinnipiac Avenue, North Haven, CT 06473, being duly sworn, deposes and says:

1. That this Affidavit is made of my personal knowledge;
2. That I am over 18 years of age;
3. That I believe in the obligation of an oath;
4. That on this date, March 10, 1998, as required by Rule 29, three copies of the enclosed PETITION FOR A WRIT OF CERTIORARI, prepared by the above named Petitioner Wallace L. Joyce in accordance with Rule 33.1, were served on each party to the above proceeding or that party's counsel and on every other person required to be served, via the United States mail and that three copies of such document were served on MItchell S. Brody, Assistant State's Attorney, Appellate Bureau, Office of Chief State's Attorney, Rocky Hill, CT 06067.

Rose M. Joyce
Rose M. Joyce

STATE OF CONNECTICUT)
)ss: North Haven
COUNTY OF New Haven)

Date: 3/10/98

Personally appeared ROSE M. JOYCE, who subscribed and affirmed the truth of the foregoing Instrument and acknowledged the same to be her free act and deed, before me.

NATUZZA JOSE
NOTARY PUBLIC
MY COMMISSION EXPIRES JULY 31, 2001

Natuzza Jose
, Notary Public